

Westinghouse  
Electric Corporation

Roger E. Wills Jr.  
Assistant General Counsel and  
Group Manager

RECEIVED

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US EPA  
WESTERN PA SECTION  
3HW23

Law and Environmental  
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February 16, 1994

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Mr. Dave Turner  
Remedial Project Manager  
USEPA, Region III  
Western PA Region (3HW23)  
841 Chestnut Building  
Philadelphia, PA 19107-4431

Re: *Unilateral Administrative Order, Westinghouse Sharon Site, Sharon, Pennsylvania, Westinghouse Electric Corporation, Respondent, Docket No. III-94-011-DC*

Dear Mr. Turner:

In response to the above-referenced Order, signed by Elaine B. Wright, for Stanley L. Laskowski, Acting Regional Administrator, USEPA, Region III, Westinghouse Electric Corporation notifies the USEPA that Westinghouse (1) intends to comply with the Order, dated February 4, 1994; (2) incorporates by reference as set fully herein its response and comments on USEPA's action to take action under Section 106 with respect to this Site, dated January 11, 1993, September 30, 1993 and December 31, 1993; (3) reserves all of its rights under federal law, including without limitation the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), to obtain reimbursement for all costs resulting from the Order are inconsistent with law and/or the National Contingency Plan ("NCP"); and (4) reserves its rights to supplement and add to its comments on the Amended Order.

Although Westinghouse has indicated its intent to perform pursuant to the foregoing paragraph, Westinghouse has substantial objections to the Order. In essence, Westinghouse objects to the issuance of the Order and to certain of its requirements which USEPA imposes upon Westinghouse through the Order on the grounds that such requirements, as well as the mere issuance of the Order, violate the Constitution of the United States, exceed USEPA's authority under the Administrative Procedure Act (the "APA"), the National Environmental Policy Act ("NEPA") and CERCLA, and are not otherwise authorized by applicable law and/or regulation. Nevertheless, notwithstanding the inclusion or omission of any specific comment in this response, Westinghouse expressly reserves, and does not waive, any and all rights, including, without limitation, any and all defenses and objections to liability under CERCLA and to this Order.

**COMMENTS, OBJECTIONS, DEFENSES AND NOTICE**

1. Westinghouse objects to the Order because issuance of the Order to Westinghouse without a hearing violates the due process clause of the U.S. Constitution.

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The issuance of the Order to Westinghouse violates the due process clause of the Constitution of the United States because USEPA failed to provide Westinghouse with notice and an opportunity to challenge the provisions of the Order. Under the terms of the Order, the Order was effective before Westinghouse was given the opportunity to request and have a hearing with USEPA with respect to the Order. As an agency of the United States government, USEPA is required to comply with the due process clause of the United States Constitution. The fundamental principle of the due process clause is that the United States government must provide notice and an opportunity to be heard before interfering with property rights. Even though the Order, by its terms, substantially impacts the property rights of Westinghouse, USEPA did not provide Westinghouse with notice or an opportunity to be heard in a fair and objective forum before unilaterally imposing the Order. Consequently, the mere issuance of the Amended Order violates the due process clause of the U.S. Constitution.

This violation is not obviated by the opportunity to confer with USEPA afforded by Paragraph XXI of the Order. While a conference could be scheduled to occur within three business days after the effective date of the Order, it was only an opportunity to confer. It did not provide Westinghouse with an adequate opportunity to be heard. Certainly, the opportunity to confer after an Order has become effective does not satisfy the due process mandate of the U.S. Constitution.

2. Westinghouse objects to the Order because issuance of the Order in the absence of a threat to public health exceeds USEPA's authority under Section 106 of CERCLA.

The issuance of the Order also exceeds USEPA's authority under CERCLA, for two reasons. First, there is no imminent and substantial endangerment to the public health or welfare or the environment. Second, the Order is not necessary to protect public health and welfare and the environment.

USEPA's authority to issue unilateral orders under CERCLA derives from the grant of authority to the President in Section 106(a):

*[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from the facility, ... [t]he President may ... take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.*

Among other things, therefore, Section 106 limits the situations under which an order may be issued to those instances in which it has been determined that there may be an imminent and substantial endangerment. Furthermore, Section 106 limits the scope of the orders which may be issued in such situations to those orders that are necessary to protect public health welfare and the environment.

The record is devoid of any information that indicates that there is "an imminent

and substantial endangerment to the public health or welfare or the environment" sufficient to justify the issuance of the Order. The USEPA has known since the 1986 subsurface study that oil and PCBs were floating on the groundwater at the site. Further, Westinghouse, at a meeting in USEPA office on January 16, 1991, discussed its proposal to take interim action to remove the floating oil. Thus, USEPA was in possession of this information for over six (6) years before it began to take an action under the provisions of Section 106. In fact, USEPA, after receipt of this information did not require any action to begin removal until two (2) years after Westinghouse proposed to take action with respect to this material. Furthermore, since there was no indication from the sampling being performed under the Remedial Investigation and Feasibility Study (RI/FS) being conducted at the Site, that the groundwater was moving or that the floating materials were moving. Therefore, the issuance of the Amended Order exceeds the authority of the USEPA and is in violation of CERCLA. See Attachment 1.

3. Westinghouse objects to the Order because issuance of the Order violates NEPA.

NEPA provides that all federal agencies shall prepare a detailed statement, by a responsible official, on all actions that significantly affect the quality of the human environment. Although USEPA has claimed that it is not subject to NEPA in actions taken under CERCLA, the legislative history suggest otherwise.<sup>1</sup> Further, the actions of USEPA prior to the amendment of the NCP in 1990 and the inclusion of the requirement to prepare an Engineering Evaluation/Cost Analysis ("EE/CA") is an admission that USEPA must at least perform the functional equivalent of an Environmental Impact Statement ("EIS").<sup>2</sup> The courts have applied the functional equivalence exemption to those actions taken by USEPA under statutes that do not have an explicit exemption from NEPA. While the precise boundaries of the functional equivalent exemption may not be defined, it is clear that, in order for USEPA to take benefit of the exemption, there must be extensive procedures, including public participation, for evaluating the environmental issues involved. A review of the record established by USEPA for the Order demonstrates that this was not done prior to the issuance of the Order.

NEPA recognizes that there are some situations in which time constraints would preclude the preparation of an EIS. In those emergency situations the agency is not required to prepare an EIS so long as the action required was not over a substantial period of time. In the instant matter, the Order was not issued until six (6) years after

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<sup>1</sup> Senate Report No. 848, 96th Cong., 2d Sess. 61 (1980).

<sup>2</sup> Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir 1973)

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the presence of PCBs on the groundwater, two (2) years after Westinghouse proposed for the second time to remove the material and one (1) year after USEPA indicated its intent to use Section 106. Clearly, this action was not within the emergency exception provisions of NEPA. Therefore, the issuance of the Order, without an EIS or its functional equivalent, is a violation of NEPA.

4. Westinghouse objects to the Order, because issuance of the Order was not in accordance with the provisions of the NCP.

The NCP proscribes certain requirements that must be followed in determining the appropriate actions to be taken in a removal action. The record for the Order is devoid of any reference to documents that demonstrate that the USEPA has considered and evaluated the factors set forth in 40 C.F.R. §300.415. Further, as Westinghouse commented in its previous correspondence and meetings with the USEPA, the USEPA did not prepare an EE/CA as required by 40 C.F.R. §300.415(b)(4)(i). USEPA alleged no facts in the Order to attempt to justify its failure to prepare an EE/CA. In fact, the Order's Findings of Fact, paragraph 3.11, admits that the Light Non-Aqueous Phase Liquid ("LNAPL") was found in the 1986 study and it was more fully characterized during the RI. The USEPA's Findings of Fact omit any reference to either of Westinghouse's proposed plans for removal of the LNAPL. The record is clear that the Order was not time critical and USEPA was required by its own rules to prepare an EE/CA before ordering Westinghouse to disturb the soils at the site. Therefore, the Order is not consistent with the requirements of the NCP.

5. Westinghouse objects to the Order, because issuance of the Order constitutes a rulemaking and violates the APA.

Sections 8.10, 8.12, 11.2, 11.3, 18.1 and 18.2 purport to impose requirements upon Westinghouse that are beyond the scope of the authority delegated to the Administrator in CERCLA. The USEPA can not by unilateral Order undertake actions that are legislative in nature. Therefore, in the absence of an appropriate notice and an opportunity for meaningful public comment, the actions of USEPA to impose the requirements contained in these Sections upon Westinghouse is contrary to the provisions of the APA.

Very truly yours,

  
Roger E. Wills, Jr.  
Assistant General Counsel

Attachment

cc: Mr. Gordon T. Taylor  
Kenneth J. Markowitz, Esq.

## ATTACHMENT 1

# WESTINGHOUSE SHARON SITE CHRONOLOGY THROUGH FEBRUARY 4, 1994

DATE	DESCRIPTION
April 15, 1985	Westinghouse retained Rizzo Associates to prepare a work plan for the subsurface study of the Sharon Facility.
August 27, 1985	Westinghouse authorized Rizzo Associates to implement the subsurface study approved by PADER.
January 10, 1986	Rizzo Associates submittal of work plan to the USEPA at Westinghouse request.
July 18, 1986	Rizzo Associates submittal of draft comprehensive subsurface study to Westinghouse.
September 4, 1986	Rizzo Associates submittal of final comprehensive subsurface study to Westinghouse.
July-August 1988	PADER Phase II fish tissue sampling and analysis.
August 22, 1988	Westinghouse comments on the proposed addition of the Sharon site to the NPL.
September 30, 1988	Westinghouse signs a Consent Order with PADER.
October 4, 1988	Rizzo Associates receives RI/FS RFP from Westinghouse.
October 18, 1988	Rizzo Associates submits revised RI/FS proposal to Westinghouse.
January 23, 1989	Rizzo Associates submits RI/FS Work Plan, QAPP, HSP and FSP to PADER.
March 17, 1989	PADER and USEPA submit comments on the 1/89 RI/FS documents.
April 28, 1989	Rizzo Associates transmits RI/FS documents to PADER.
June 6, 1989	Rizzo Associates summary of June 1, 1989 public meeting.
July 18, 1989	Rizzo Associates summary of monitoring well status.
July 21, 1989	Westinghouse comments on implementing eight tasks sighted in a July 6, 1989 PADER letter.
July 28, 1989	Rizzo Associates transmits Revision 2 of RI/FS Work Plan.
October 25, 1989	Rizzo Associates summary of monitoring well repair.
December 1, 1989	Comments from USEPA on Revision 2.
December 15, 1989	Revisions to FSP, inclusion of sewer study.
December 21, 1989	Inclusion of Sewer study.
January 11, 1990	PADER transmits adjacent well data.

**WESTINGHOUSE SHARON SITE CHRONOLOGY  
THROUGH FEBRUARY 4, 1994**

DATE	DESCRIPTION
January 31, 1990	Westinghouse RFP for RI/FS Phase I activities.
March 8, 1990	Rizzo Associates notifies PADER of initiation of field work.
April 1990	Correspondence related to access to Cyclops property.
April 9, 1990	Commence drilling and installation of OS series monitoring wells.
April 10, 1990	Conference call with PADER on well inventory and proposed well use alternatives.
April 11, 1990	Rizzo Associates summary of monitoring well status.
April 30, 1990	Notice of failure to comply with obtaining site access permits from PADER.
May 3, 1990	RI/FS Work Plan revisions requirement letter from PADER.
May 19, 1990	Revision to Work Plan submitted to PADER.
June 7, 1990	Completion of drilling and installation of OS series monitoring wells.
June 15, 1990	Rizzo Associates summary tables of RI/FS Phase IA samples to PADER.
June 28, 1990	Site meeting with PADER and USEPA.
August 12, 1990	PCB analysis of moat soil samples.
September 11, 1990	Conference call with PADER concerning well substitutions and moat sampling.
January 14, 1991	PADER and USEPA comment on May 19, 1990 RI/FS Addendum.
January 16, 1991	Meeting at USEPA to discuss Work Plan Addendum, COI and interim action oil removal.
February 11, 1991	Meeting at USEPA with PADER and USEPA.
February 12, 1991	Transmitted moat transect results to the PADER and USEPA.
February 19, 1991	Conference call with USEPA on Addendum.
February 20, 1991	Conference calls with USEPA.
March 7, 1991	Conference call with PADER and USEPA.
March 12, 1991	Conference call with PADER.

**WESTINGHOUSE SHARON SITE CHRONOLOGY  
THROUGH FEBRUARY 4, 1994**

DATE	DESCRIPTION
March 22, 1991	Rizzo Associates transmits Phase IA lab data to USEPA.
May 7, 1991	RI/FS Work Plan Addendum and Work Plan comments received from PADER.
July 15, 1991	Westinghouse responds to PADER May 1991 comments and floating oil issues.
August 23, 1991	PADER comments on Westinghouse Work Plan Addenda and Interim Oil Recovery Proposal (two letters).
August 27, 1991	Comments clarification letter from PADER.
September 13, 1991	Revised RI/FS schedule transmitted to PADER.
October 17, 1991	Rizzo Associates summary of adjacent monitoring wells.
October 25, 1991	Westinghouse responds to August 23, 1991 PADER comments.
November 6, 1991	Meeting in Meadville, Pennsylvania to discuss initiation of Phase IB of the RI/FS. Westinghouse and Rizzo Associates were informed that outstanding comments were being developed by USEPA.
April 1, 1992	PADER comments to Work Plan Addendum responses dated October 25, 1991.
April 13, 1992	PADER comments to Work Plan Addenda for Interim Oil Recovery responses dated October 25, 1991.
April 22, 1992	Meeting at USEPA with PADER.
April 24, 1992	USEPA letter containing outline for preparing FFS for an Interim Action Source Control.
April 28, 1992	PADER letter summarizing meeting of April 22, 1992.
May 11, 1992	USEPA letter on inclusion of Well PW-1 for manganese sampling.
May 19, 1992	Rizzo Associates initiated Phase IB well installation and abandonment activities.
June 8, 1992	PADER letter summarizing conference call regarding FFS for an Interim Action Source Control.
June 17, 1992	Westinghouse transmits FFS for Operable Unit 2 to PADER and USEPA.
June 23, 1992	Rizzo Associates transmits notification of groundwater surface water/sediment sampling.

**WESTINGHOUSE SHARON SITE CHRONOLOGY  
THROUGH FEBRUARY 4, 1994**

DATE	DESCRIPTION
June 23, 1992	Westinghouse transmits waste disposal volume estimates and budget estimates for OU2's FFS to PADER and USEPA.
June 29, 1992	Rizzo Associates initiated Phase IB RI/FS sampling activities.
August 4, 1992	Rizzo Associates transmits RI/FS FSP (Revision 4) and RI/FS Work Plan (Revision 2).
August 6, 1993	PADER and USEPA comment on FFS for OU2.
August 17, 1992	Geraghty & Miller initiated well installation for Interim Action Source Control of OU2.
August 28, 1992	Geraghty & Miller transmit FFS for OU2 (first revision) to PADER and USEPA.
August 31, 1992	PADER letter summarizing conference call on August 12, 1992.
September 13, 1992	Rizzo Associates transmits revised schedule for RI/FS work to PADER and USEPA.
September 29, 1992	USEPA comments to FFS for OU2 (first revision).
September 29, 1992	Westinghouse summarizes teleconference on October 14, 1992--regarding revision of Phase IB work scope to include additional monitoring wells.
November 2, 1992	PADER letter summarizing telephone conversation with Westinghouse of October 26, 1992 and PADER approval of request for additional monitoring wells.
November 10, 1992	PADER comment letter FFS for OU2 (first revision).
December 3, 1992	Rizzo Associates transmits Phase IB RI/FS data summary to PADER and USEPA.
December 3, 1992	Westinghouse and Rizzo Associates personnel conduct site visit with PADER personnel.
December 22, 1992	USEPA letter notifying Westinghouse of liability under Section 107(a) of CERCLA, with respect to the Sharon Superfund Site.
December 30, 1992	Geraghty & Miller transmit data summaries for work performed during Interim Action Source Control program, OU2.



**WESTINGHOUSE SHARON SITE CHRONOLOGY  
THROUGH FEBRUARY 4, 1994**

DATE	DESCRIPTION
January 4, 1993	Rizzo Associates transmits polychlorinated dioxin/furan analytical results (summary tables).
January 11, 1993	Westinghouse responds to USEPA letter dated December 22, 1992.
February 18, 1993	Rizzo Associates transmits Data Validation Summary report for polychlorinated dioxin/furan analytical results.
February 22, 1993	USEPA requests additional information regarding the Phase IB RI/FS data summary package.
February 25, 1993	USEPA requests additional information regarding the Phase IB RI/FS data summary package.
March 2, 1993	Westinghouse transmits list of correspondence to PADER.
March 5, 1993	Westinghouse responds to USEPA letters of February 22, 1993 and February 25, 1993.
June 24, 1993	PADER transmits USEPA and PADER comments on the Phase IB data submittal.
June 30, 1993	USEPA transmits Draft Consent Order for removal of LNAPL and copy of Action Memorandum dated December 30, 1992.
July 19, 1993	Westinghouse performed site visit for representatives of USEPA, PADER, and USFWS.
July 20, 1993	Meeting at PADER to discuss PADER and USEPA comments on the Phase IB data submittal.
July 21, 1993	Westinghouse responds to USEPA June 30, 1993 submittal.
July 29, 1993	Meeting at USEPA Region III to discuss PADER and USEPA comments on the Phase IB data submittal.
August 4, 1993	Westinghouse performed site visit for two PADER representatives.
August 12, 1993	Westinghouse transmits current understanding of issues related to July 20 and July 29, 1993 meetings.
August 12, 1993	PADER transmits the Agencies understanding of issues discussed during the July 20 and July 29, 1993 meetings.

**WESTINGHOUSE SHARON SITE CHRONOLOGY  
THROUGH FEBRUARY 4, 1994**

DATE	DESCRIPTION
August 24, 1993	Meeting at Westinghouse headquarters with USEPA regarding the draft Administrative Consent Agreement.
September 1, 1993	Westinghouse notifies PADER and USEPA of change in Supervisory Contractor.
September 9, 1993	Westinghouse requests 45-day extension for submittal of Phase II RI/FS Work Plan due to delays in laboratory data retrieval.
September 20, 1993	Westinghouse transmits proposed language for the Consent Agreement for CERCLA removal to USEPA.
September 28, 1993	PADER approves Westinghouse request for extension for submittal of Phase II RI/FS Work Plan.
September 29, 1993	USEPA transmits follow-up letter to August 24, 1993 meeting on Consent Agreement to Westinghouse.
September 30, 1993	Westinghouse transmits follow-up letter to August 24, 1993 meeting on Consent Agreement to USEPA.
October 12, 1993	Cummings/Riter transmits Clement Associates, Inc. Report and historical groundwater and product level tables to PADER.
October 12, 1993	Meeting at PADER to discuss Agency comments on Phase 1B submittals and scope of Phase II RI/FS activities.
October 26, 1993	Westinghouse submits Phase II RI/FS Sampling and Analysis Plan Addendum to PADER and USEPA.
December 2, 1993	Final Consent Order for removal of LNAPL issued by USEPA.
December 8, 1993	Westinghouse transmits Phase 1B TCL/TAL data to PADER.
December 31, 1993	Westinghouse response to Final Consent Order for removal of LNAPL.
February 4, 1994	Unilateral Administrative Order issued for removal of LNAPL by USEPA.